Supreme Court, U.S.
FILED
FEB 12 1993
OFFICE OF THE CLERK

No. 91-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

v.

KEVIN TAYLOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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Printed by Authority of the State of Illinois (P.O. 35735—60—2-12-93)

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ARGUMENT

I.

THE "RIGHT TO PRESENT A DEFENSE" IS TOO GENERAL A PROPOSITION TO DICTATE A RESULT UNDER *TEAGUE*.

Taylor asks this Court to extend the Due Process Clause to jury instructions on every affirmative defense defined by state law. Conspicuously absent from Taylor's brief is any citation to even a *single case* from this Court (or from virtually any other court) applying the Due Process Clause to an affirmative defense that does not implicate an element of the charged crime. It comes as no surprise, then, that Taylor chose to characterize the rule he invokes at such a high level of abstraction; without any specific case supporting his position, Taylor must rely on general principles extracted from earlier cases in an effort to extend precedent. As this Court has repeatedly held, however, courts may extend precedent on direct review but not on collateral review. " 'Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments. It is not designed as a substitute for direct review.' " *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion) (quoting *Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in part and dissenting in part)).

Rather than extend precedent, courts must, on collateral review, apply rules compelled by precedent existing when the prisoner's conviction became final. *Graham v. Collins*, 61 U.S.L.W. 4127, 4129 (U.S. Jan. 26, 1993) (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)). Even if a habeas petitioner relies on an old rule, applying the rule "in a novel setting, thereby extending the precedent," violates *Teague*.

Stringer v. Black, 112 S. Ct. 1130, 1135 (1992). Accordingly, "[t]he crux of the analysis when *Teague* is invoked . . . is identification of the rule on which the claim for habeas relief depends." *Wright v. West*, 112 S. Ct. 2482, 2501 (1992) (Souter, J., concurring). Characterizing precedent by its underlying principles, as Taylor does, rather than by the holdings of the relevant cases, provides the mechanism for extending precedent rather than applying existing rules.[1] Taylor, however, does just what *Teague* prohibits: he insists that this conviction violated due process based on analogy from, rather than holdings of, earlier cases. Such arguments must fail under *Teague*.

This Court rejected an argument like Taylor's based on general principles in *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822 (1990). In *Sawyer*, the state prosecutor had allegedly violated Robert Sawyer's Eighth Amendment rights by emphasizing to the jury, during closing argument, that the jury's decision to impose the death penalty would be reviewed by the courts. 110 S. Ct. at 2825-26. *Caldwell v. Mississippi*, 472 U.S. 320 (1985), announced such an Eighth Amendment rule, but this Court decided *Caldwell* more than a year after Sawyer's conviction became final. 110 S. Ct. at 2826. Under *Teague*, therefore, the Court had to inquire first whether *Caldwell* announced a new rule because, if so, the Court could not apply *Caldwell* to Sawyer's case.

This Court held that *Caldwell* indeed announced a new rule because it was not dictated by existing precedent.

[1] "*Teague* and *Butler* [*v. McKellar*, 494 U.S. 407 (1990),] hold that federal courts may not consider a habeas petition if the petitioner relies on inferences based on the reasoning in the opinion rather than on holdings within the four corners of Supreme Court precedents." Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. Rev. 609, 641 (1991).

110 S. Ct. at 2827-31. Sawyer argued to the Court that *Caldwell* "was 'rooted' in the Eighth Amendment command of reliable sentencing" and that the application of this Court's precedent that recognized this Eighth Amendment interest to "misleading prosecutorial comment 'by analogy' would lead to the predictable *Caldwell* result." *Id.* at 2828. The Court quickly rejected this argument, however, because it found the Eighth Amendment command of reliable sentencing too general to dictate any specific result. *Id.* As the Court explained, the new-rule inquiry "would be meaningless if applied at this level of generality." *Id.*

The right to present a defense suffers from the same problem of generality. Sawyer's reliability-in-sentencing argument was *consistent* with the result he sought, but it was too general a principle to dictate any specific result because the Court had never held that all errors that might affect the reliability of a capital sentencing procedure violate the Eighth Amendment. Likewise, the right to present a defense is expansive enough to embrace virtually *any* argument presented by a criminal defendant; what state procedural error does not, in some way, affect a defendant's right to present a defense?

Taylor insists that the "right to present a defense" is not too general a characterization under *Teague*. Brief for Respondent, p. 34 n.17. He argues that this proposed rule is "necessarily a general one" and that specific applications of general rules cannot be "new rules" under *Teague*. *Id.* (citing *Wright v. West*, 112 S. Ct. at 2499 (Kennedy, J., concurring). This argument misapplies Justice Kennedy's point in *Wright*. Justice Kennedy explained that *Jackson v. Virginia*, 443 U.S. 307 (1979), exemplified a case whose rule requires a "case-by-case examination of the evidence" that would rarely trigger a new rule just because a habeas

court had not yet examined the specific evidence at issue in a given case. *Wright*, 112 S. Ct. at 2499 (Kennedy, J., concurring). *Jackson*, "[b]y its very terms[, . . .] provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all the evidence, so of course there will be variations from case to case." *Id.* Taylor, however, does not ask the Court to apply an accepted rule to a specific set of evidentiary *facts*; he asks the Court to expand upon and clarify the *law* in this murky area of due process.

The diverse precedent upon which Taylor relies certainly supports the uncontroversial proposition that the procedural component of the Due Process Clause preserves the right to defend oneself in a criminal trial in relation to the elements of the charged crime. Taylor cites *no case*, however, that describes, with any degree of specificity, why the general principles underlying this right to present a defense necessarily extend to affirmative defenses that a government might choose to permit a defendant to plead.

A. Cases Adjudicating Issues of Federal or State Law Cannot Dictate Results Under the Due Process Clause.

Many of the cases that Taylor cites do not even announce constitutional holdings; these courts merely address federal or state criminal procedure.[2] In *Strauss v.*

[2] *See Spurr v. United States*, 174 U.S. 728, 735 (1899); *United States v. Bailey*, 444 U.S. 394, 415-16 (1980); *Hickory v. United States*, 160 U.S. 408, 423 (1896); *Quercia v. United States*, 289 U.S. 466, 472 (1933); *Hopt v. Utah*, 110 U.S. 574, 583 (1884); *United States v. Middleton*, 690 F.2d 820, 826 (11th Cir. 1982), *cert. denied*,

(Footnote continued on following page)

United States, 376 F.2d 416 (5th Cir. 1967), for example, the Fifth Circuit overturned a conviction on procedural, not constitutional, grounds. *Id.* at 418-19. The court never suggested that the jury instruction error in that case "violated a defendant's right to due process of law." Brief for Respondent, p. 30. Whether federal criminal procedure would have required the federal government to retry Taylor is no more relevant to this habeas corpus proceeding than whether Illinois law would have required a retrial. *Sawyer*, 110 S. Ct. at 2830 (" 'the availability of a claim under state law [or, by implication, federal law] does not of itself establish that a claim was available under the United States Constitution' ") (quoting *Dugger v. Adams*, 489 U.S. 401, 409 (1989)). Taylor cannot rely on these criminal procedure cases to support his constitutional claim.

B. Cases Applying a Right to Present a Defense to the Elements of Crimes Never Even Address that Much More Difficult Question of Whether the Right Would Also Extend to Affirmative Defenses.

Other cases upon which Taylor relies address elements of crimes rather than affirmative defenses and exemplify cases of gross procedural unfairness that rise to the level of a due process violation. The instant case pales in comparison.

For example, *In re Oliver*, 333 U.S. 257 (1948), invalidated a summary criminal trial proceeding akin to the Court of Star Chamber in which a judge, also sitting as

[2] *continued*
460 U.S. 1051 (1983); *United States v. Blair*, 456 F.2d 514, 520 n.5 (3d Cir. 1972); *Allen v. State*, 97 Nev. 394, 397, 632 P.2d 1153, 1155 (1981).

a one-man grand jury, summarily charged, convicted and sentenced Oliver in a secret proceeding without giving notice, permitting him to obtain counsel or granting him the opportunity to cross-examine witnesses who testified against him. *Id.* at 258-60. Given these many, serious procedural irregularities, Oliver had no fair chance to defend himself in relation to the elements of the charged crime. The Court indeed stated that Oliver "had a right to his day in court" (*id.* at 273), but this general comment hardly constitutes the Court's holding and it surely could not dictate the result that Taylor seeks. *Oliver* merely holds that summary criminal convictions, without notice, hearing and counsel, violate due process. *Id.* at 275-76. Other than allowing Taylor to pluck some choice language out of context, *Oliver* is completely inapposite to this case.

Oliver, like many other cases that Taylor cites,[3] simply begs the question of whether the Due Process Clause ap-

[3] *See Washington v. Texas*, 388 U.S. 14, 17-23 (1967) (state law wrongly prevented defendant from calling witness to testify regarding the commission of the offense); *Chambers v. Mississippi*, 410 U.S. 284, 291 (1973) (same); *Rock v. Arkansas*, 483 U.S. 44, 57 (1987) (state procedural rule prevented the defendant "from describing any of the events that occurred on the day of the shooting"); *Crane v. Kentucky*, 476 U.S. 683, 687-92 (1986) (evidence relating to credibility of confession excluded); *Webb v. Texas*, 409 U.S. 95, 98 (1972) (per curiam) (trial judge interfered with defendant's witness who would testify about the commission of the crime); *Spurr*, 174 U.S. at 735 (elemental issues of intent and knowledge taken from the jury); *Quercia*, 289 U.S. at 472 (improper judicial comment on evidence relating to element of charged offense); *Hopt*, 110 U.S. at 583 (same); *Hickory*, 160 U.S. at 423 (instruction affected jury's deliberation on element of offense); *Cool v. United States*, 409 U.S. 100, 101-04 (1972) (per curiam) (same); *United States v. Escobar de Bright*, 742 F.2d 1196, 1201-02 (9th Cir. 1984) (same); *United States v. Hicks*, 748 F.2d 854, 857-58 (4th Cir. 1984) (failure to give alibi instruction violated due process); *Zemina v. Solem*, 438 F. Supp. 455, 469-70 (D. S.D. 1977) (instructions prevented a finding of in-

(Footnote continued on following page)

plies to an affirmative defense created by state or federal criminal law. In fact, at least one of the cases he cites explicitly supports Gilmore's position. In *State v. Miller*, 186 Conn. 654, 660, 443 A.2d 906, 909 (1982), the Connecticut Supreme Court indeed stated that the defendant had a constitutional right to an instruction on self-defense, but only because the lack of self-defense constituted an element of the charged crime under Connecticut law. *See State v. Preyer*, 198 Conn. 190, 198-99, 502 A.2d 858, 862-63 (1985) (the "due process right to establish a defense" only extends to elements of crimes); *State v. Suggs*, 209 Conn. 733, 751, 553 A.2d 1110, 1121 (1989) (*Preyer* holds that due process only extends to elements and not affirmative defenses). The Connecticut Supreme Court unanimously agrees with Gilmore's position.

Unlike Mr. Oliver, Taylor essentially conceded that he committed the elements of the charged crime of murder. Taylor never contested that he killed Scott Siniscalchi and he never contested that he intended to do so. His jury heard the government's evidence on these points, found

[3] *continued*

tent), *aff'd*, 573 F.2d 1027 (8th Cir. 1978) (per curiam); *Naugher v. State*, 685 P.2d 37, 41 (Wyo. 1984) (same). The directed verdict cases (*e.g.*, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)) and presumption cases (*e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979)) similarly address elements rather than affirmative defenses.

Other cases that Taylor cites are distinguishable because they are capital cases. *See Green v. Georgia*, 442 U.S. 95 (1979) (per curiam) (testimony relevant to the acts causing the victim's death excluded as hearsay); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (invalidating instructions relevant to mitigation evidence). The Constitution requires proper jury instructions on all mitigating evidence in capital cases. *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990). Justice Scalia's comments in dissent must also be read in this light. *Id.* at 459-60 n.1 (Scalia, J., dissenting).

it persuasive beyond a reasonable doubt and convicted him of murder. Accordingly, Taylor unquestionably asks this Court to *extend* the holding of these elements cases to affirmative defense cases like this one. It is hardly "obvious," therefore (Brief for Respondent, p. 12), that Illinois violated his "right to present a defense" when this Court has never yet extended the Due Process Clause as Taylor wishes.[4] As the *Preyer* court held:

> Despite the defendant's contention to the contrary, *Washington v. Texas* does not establish an unqualified constitutional right to correct jury instructions on any defense the defendant may have. The only relevant issue therein decided was the applicability, in state court proceedings, of the sixth amendment right of a criminal defendant to have compulsory process for obtaining witnesses in his favor.

198 Conn. at 197 n.9, 502 A.2d at 862 n.9 (internal citation omitted). This statement reflects a patently reasonable restatement of *Washington*'s holding. This Court may *extend* this holding to include jury instructions on affirmative defenses at some time in the future. It cannot do so

[4] As late as 1976, Professor Clinton (whom Taylor cites in support of his theory) was constrained to report that, despite cases such as *Cool* and *Washington v. Texas*, this Court "has had occasion to review many cases which touch on this issue and yet has rarely suggested that the criminal defendant has a right to present his defense or explained the appropriate test to be applied to such a guarantee." Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 714 (1976) (footnotes omitted). *See also id.* at 795 ("While the Supreme Court's prior right to defend cases provide some suggestions regarding the source of this constitutional right, the cases almost totally fail to provide any rationale or consistent test to be applied in such cases"). The "lack of theoretical development" that Professor Clinton pointed to in this article (*id.* at 714) is even more telling in the context of affirmative defenses created solely by state law.

on collateral review, however, without ignoring *Teague*'s well-established rule of retroactivity.

C. The Only Cases That Taylor Cites Finding a Constitutional Right to Present a Defense in the Context of a Pure Affirmative Defense Are Distinguishable Because Taylor Never Offered a Correct Instruction and Because Only Minimal Evidence Supported Voluntary Manslaughter.

Taylor cites to only one appellate court in the country (other than the Seventh Circuit) that has found a right to present a defense in the context of an affirmative defense distinct from the elements of the charged crime. *See United States ex rel. Means v. Solem*, 646 F.2d 322 (8th Cir. 1980). Even in the Eighth Circuit, however, Taylor would not prevail on habeas corpus, because that court requires significant evidence supporting the affirmative defense and requires a contemporaneous request for a correct instruction. *See Frey v. Leapley*, 931 F.2d 1253, 1255 (8th Cir. 1991); *Woods v. Solem*, 891 F.2d 196, 198-99 (8th Cir. 1989), *cert. denied*, 495 U.S. 920 (1990).[5] Under these cases, Taylor's conviction would not violate due process because he never objected to the instruction and because his affirmative defense case was not even close.

[5] Indeed, the Seventh Circuit itself had previously required "unequivocally strong" evidence to support the requested instruction before it would find that a state court's refusal to give the instruction amounted to a fundamental miscarriage of justice. *United States ex rel. Peery v. Sielaff*, 615 F.2d 402, 404-07 (7th Cir. 1979) (per curiam), *cert. denied*, 446 U.S. 940 (1980). The court inexplicably retreated from this high threshold in the decision below and seized instead upon a dictum in *United States ex rel. Bacon v. DeRobertis*, 728 F.2d 874, 875 (7th Cir.) (per curiam), *cert. denied*, 469 U.S. 840 (1984), suggesting that the Due Process Clause requires an affirmative defense instruction whenever "credible" evidence supports it. Pet. App. 18. The decision below is apparently the first in the land to announce such a minimal standard for due process scrutiny.

Illinois law required the trial court to instruct Taylor's jury on voluntary manslaughter if only "very slight evidence" supported the charge (*People v. Williams*, 205 Ill. App. 3d 751, 765, 563 N.E.2d 762, 770 (1st Dist. 1989), *appeal denied*, 141 Ill. 2d 558, 580 N.E.2d 132 (1991); *People v. Arnold*, 139 Ill. App. 3d 429, 434, 487 N.E.2d 997, 1000 (1st Dist. 1985)), and that was the case here. As the Illinois Appellate Court held in Taylor's state appeals, Taylor had presented no evidence whatsoever that his passion was sudden and "the provocation was very questionable." Pet. App. 38, 42-43. The court explained that the record "clearly shows" that correct instructions "would have been *very unlikely* to have resulted in" a conviction of voluntary manslaughter rather than murder. *Id.* at 43 (emphasis added). Given this straightforward application of the Illinois law of voluntary manslaughter on two separate occasions by unanimous Illinois Appellate Court panels and given the Illinois Supreme Court's refusal to review both of these appellate decisions, this Court cannot declare that Taylor's conviction amounted to a "complete miscarriage of justice [or] an omission inconsistent with rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962).[6]

[6] Taylor himself never even questioned the murder instruction until he filed his brief on direct appeal. As this Court explained in *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977), since the defense never even questioned the challenged instruction until the appeal, "the probability that it substantially affected the jury deliberations seems remote." *Accord Estelle v. Williams*, 425 U.S. 501, 510-13 (1976) (waiver indicates that an alleged error did not violate due process); *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978) (Stevens, J., dissenting) (same); *Thwing v. South Dakota*, 470 F.2d 351, 353 (8th Cir. 1972) (per curiam) (failure to object to instructions on charged offense indicated no fundamental unfairness in habeas claim based on state court's failure to instruct on an affirmative defense and on lesser included offenses), *cert. denied*, 411 U.S. 937 (1973); *Higgins v. Wainwright*, 424 F.2d 177, 178 (5th Cir.) (per

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II.

PATTERSON COULD NOT HAVE ANNOUNCED A PURELY PROCEDURAL HOLDING WITHOUT RENDERING THE WHOLE *WINSHIP* LINE OF CASES ARBITRARY AND IRRECONCILABLE.

Taylor argues that *Patterson v. New York*, 432 U.S. 197 (1977), says nothing about substantive liberty interests. The Due Process Clause applies to affirmative defenses, he reasons, because *Patterson* and like cases address only the question of how much process is due rather than whether a liberty interest exists. Brief for Respondent, pp. 43-50. This argument necessarily renders *In re Winship*, 397 U.S. 358 (1970), and subsequent cases arbitrary and unprincipled. An argument that destroys the doctrinal stability of twenty-three years of precedent cannot be said to rest on settled principles of law or be dictated by existing precedent.

Patterson superficially reads like a case analyzing how much process was due. The Court held that the Due Process Clause permitted New York to require a criminal defendant to prove provocation by a preponderance of the evidence as an affirmative defense. 432 U.S. at 205-16. As the Court later made explicit, however, *Patterson*'s holding was premised on the "greater-includes-the-lesser" concept: the "greater" power to create the affirmative defense includes the "lesser" power of establishing any burden of proof the legislature might choose. *McKoy v. North Carolina*, 494 U.S. at 442; *id.* at 450 (Blackmun, J., concurring). Thus, the Court may have drawn sharp distinctions between substance and procedure in some areas (see *Cleveland Board of Education v. Loudermill*,

[6] *continued*
curiam) (failure to request a lesser included offense instruction prevented a finding that a state conviction violated due process for failure to instruct on the lesser included offense), *cert. denied*, 400 U.S. 905 (1970). *See also infra* § III, pp. 16-19.

470 U.S. 532, 541 (1985)), but it has never done so with regard to affirmative defenses in criminal cases. The amount of process due a criminal defendant, at least with regard to affirmative defenses, depends on the substantive state law.

Furthermore, labeling *Patterson* as a strictly procedural decision would make it functionally irreconcilable with *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and would render the element-non-element distinction completely arbitrary. *See* Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 Mich. L. Rev. 30, 48-50 (1977) (procedural view of *Winship* means the amount of process due in any given case depends on the purely arbitrary question of whether a legislature includes a factor relating to culpability in the statutory definition of a crime); John C. Jeffries, Jr., & Paul B. Stephan III, *Defenses, Presumptions, and Burdens of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1344-56 (1979) (same). Comparing *Mullaney* with *Patterson* illustrates the problem. In *Mullaney*, the Court held that Maine could not require a defendant to prove provocation by a preponderance of the evidence as a mitigating factor of murder; rather, the Court held that the Due Process Clause required the state to disprove provocation beyond a reasonable doubt. 421 U.S. at 695-704. In *Patterson*, by contrast, the Court found no constitutional infirmity in New York's statutory scheme that required a defendant to prove provocation by a preponderance of the evidence just like Maine's did. 432 U.S. at 205-16. The two statutes only differed in that Maine included the *absence* of provocation as an element of murder while New York considered the *existence* of provocation as a distinct, non-elemental, affirmative defense. *Id.* at 212-16. The Court has adhered to *Patterson*'s element-non-element distinction in many subsequent cases and in a variety of contents. *See, e.g.*,

Martin v. Ohio, 480 U.S. 228 (1987); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Francis v. Franklin*, 471 U.S. 1301 (1985); *Engle v. Isaac*, 456 U.S. 107 (1982); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Jackson v. Virginia*, 443 U.S. 307 (1979).

If considered as purely procedural decisions, *Mullaney* and *Patterson* irreconcilably conflict. Both Gordon Patterson and Stillman Wilbur claimed that they deserved much lower sentences; accordingly, they had equivalent claims to natural liberty. Nonetheless, the Court found Patterson deserving of much less process than Wilbur. The different results in the two cases necessarily mean that calling a factor, like provocation, an affirmative defense rather than calling the absence of the factor an element of the crime has substantive significance.

Limiting the Due Process Clause to elements of crimes resolves the otherwise arbitrary distinction between elements and non-elements. Elements trigger due process scrutiny because our society wishes to minimize the risk of convicting innocent people of crimes. *Winship*, 397 U.S. at 372 (Harlan, J., concurring). Non-elements (like provocation in Illinois) do not trigger due process scrutiny because a state's greater power to enact an affirmative defense statute if it so chooses includes the lesser power to adjudicate those defenses by its own state procedures. "[I]f a state could choose to do something—choose, for example, to make self-defense an affirmative defense to murder—then the federal inquiry is over; whether the state has indeed so chosen is a question of its domestic law." *Flowers v. Illinois Dep't of Corrections*, 962 F.2d 703, 711 (7th Cir.) (Easterbrook, J., concurring), *petition for cert. filed*, 61 U.S.L.W. 3150 (U.S. Aug. 5, 1992) (No. 92-253) (citations omitted).

This approach also serves the laudable goal of not turning virtually every violation of state law into a federal constitutional violation:

The Constitution requires the prosecution to prove its case beyond a reasonable doubt. If the state court does not frame the instructions accurately under state law, how can the jury have found every element beyond a reasonable doubt? *Winship* implies that the state must bring forth evidence from which a sane fact finder could conclude, beyond a reasonable doubt, that the accused committed the offense. *Jackson v. Virginia*, 443 U.S. 307 (1979). Does it not then follow that any important error violates the Constitution? If the trial judge misunderstands state law, how can the jury have made the necessary findings? All of these methods [of turning state-law violations into federal constitutional violations] come to the same thing: disparity between the "real" state law and the rules applied in a particular case violates the Constitution. Yet if these and cognate methods are indeed appropriate, then the many cases telling federal courts to distinguish between violations of state and federal law are nothing but hot air. The distinction is vital but trivial, governing only when, as in *Estelle v. McGuire*, the judge is so careless as to say that the writ must issue to redress an error of state law.

Id. at 710-11 (some citations omitted).

It simply cannot be, as Taylor essentially argues, that every criminal statute written by every government creates a protectible liberty interest under the Due Process Clause. This Court has distinguished time and again between errors of state law and violations of the Constitution. *See, e.g., Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 3102 (1990); *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Isaac*, 456 U.S. at 121 n.21; *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (per curiam); *Beck v. Washington*, 369 U.S. 541, 554-55 (1962); *Gryger v. Burke*, 334 U.S. 728, 731 (1948). Clearly, then, not *all* statutes create a "substantial and legitimate expectation" of a statutory right. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). "If the contrary were

true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.' " *Isaac*, 156 U.S. at 121 n.21 (quoting *Gryger*, 334 U.S. at 731)).[7]

Taylor argues that he had an entitlement to his voluntary manslaughter defense and an entitlement to natural liberty, so the state-law jury instruction error arbitrarily denied him due process. *Engle v. Isaac* and numerous circuit court cases are different from this case, he suggests, because the state statutes that were violated in those cases created no entitlements and did not affect the habeas petitioners' liberty. Brief for Respondent, pp. 48-49 & n.25. The facts of those cases, however, do not permit such a facile distinction.

In *Isaac*, for example, the jury instructions wrongly required the habeas petitioners to prove self-defense. If Taylor had a substantial and legitimate expectation that he would be sentenced to a maximum of fifteen years if the jury believed his *partial* affirmative defense, then Isaac, Hughes and Bell certainly had substantial and legitimate expectations that they would be acquitted if Ohio failed to disprove, beyond a reasonable doubt, their *complete* defenses. Although the *Isaac* jury instruction error related to the burden of proof, the application of that drastically wrong burden of proof may well have deprived the defendants of their defenses. It defies reason to suggest that,

[7] These concerns, at least initially, did not trouble the Seventh Circuit. In *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), which first found the pattern instructions unconstitutional, the court intended to "effectuat[e] the holding of *Reddick* through the vehicle of the Due Process Clause." *Id.* at 1136. That rationale "produced something of an embarrassment, for characterizing the rule as 'effectuat[ing] the holding of *Reddick*,' " a decision on state law, " 'through the vehicle of the Due Process Clause' shows that we do not have a constitutional rule at all." *Flowers*, 962 F.2d at 709 (Easterbrook, J., concurring).

in a criminal case, radically shifting the burden of proof can have no effect on the defendant's expectation of natural liberty.

In sum, the constitutionality of Taylor's jury instructions depends on how much deference the due process clause affords to state courts to adjudicate their own procedural errors. The Illinois Supreme Court has held that these pattern instructions seriously misstated Illinois law, but not seriously enough to invalidate final convictions. *See generally People v. Flowers*, 138 Ill. 2d 218, 561 N.E.2d 674 (1990). The Seventh Circuit should not have intruded into that application of Illinois law. *See Flowers*, 962 F.2d at 711 (Easterbrook, J., concurring) ("Judges of a state's highest court must now think thrice before they find a flaw in a pattern jury instruction! From now on, prudence lies in perpetuating dubious instructions rather than improving them"). Until this Court articulates a definitive standard for distinguishing state-law errors from due process violations, jury instruction errors like Taylor's cannot violate due process other than by virtue of new rules under *Teague*.

III.

IF TAYLOR HAD A STATUTORY ENTITLEMENT TO PRESENT A DEFENSE, HE WAIVED THAT RIGHT BY NOT OBJECTING AT TRIAL TO THE INSTRUCTIONS.

For the first time since his murder conviction in 1986, Taylor argues that he had a statutory entitlement to jury consideration of voluntary manslaughter and, because the instructions might have permitted the jury to convict him without considering his affirmative defense, the conviction violated due process under *Hicks v. Oklahoma*.[8] If the

[8] On direct appeal, Taylor apparently only argued that his instructions violated Illinois law. The Illinois Appellate Court found that

(Footnote continued on following page)

Court finds an entitlement despite *Patterson*, Taylor's argument still fails because Illinois criminal procedure afforded him more than adequate process.[9]

Section 115-4(a) of the Code of Criminal Procedure of 1963 states that questions of fact shall be decided by the jury. Ill. Rev. Stat. ch. 38, ¶ 115-4(a) (1985). To the extent that the jury charge permitted the jury to find Taylor guilty of murder without resolving the factual issue of provocation, the state trial court violated section 115-4(a). Taylor would presumably claim that every violation of section 115-4(a) violates the Due Process Clause, but such a claim would ignore the other statutory procedures designed specifically to remedy procedural errors like the one in this case. The Illinois Supreme Court's rules governing criminal trial procedure require counsel to object at the jury instruction conference to contest a jury instruction. Ill. Sup. Ct. R. 451(b), Ill. Rev. Stat. ch. 110A,

[8] *continued*
he had waived any error by not tendering a proper instruction and that, because his voluntary manslaughter evidence was not strong, he could not establish plain error. Pet. App. 38. On state collateral review, Taylor argued that the recently-decided case of *People v. Reddick*, 123 Ill. 2d 184, 526 N.E.2d 141 (1988), held that use of the pattern instructions constituted plain error and established that his conviction violated due process under *In re Winship*. The Illinois Appellate Court rejected this argument because, under *Patterson v. New York*, *Winship* does not extend to affirmative defenses. Pet. App. 41-42. In the lower federal courts, Taylor argued that the absence of provocation constituted an element of murder in Illinois. Brief for Appellant at 13-18, *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir. 1992). He also superficially argued that the instructions were fundamentally unfair but without any succinct analysis. *Id.* at 22-24.

[9] The Seventh Circuit found that Illinois had waived a procedural default argument premised on *Wainwright v. Sykes*, 433 U.S. 72 (1977). Pet. App. 17 n.5. Gilmore does not press that argument in this Court, either. Rather, as explained in the text, procedural default also materially affects the merits of Taylor's due process claim under *Hicks v. Oklahoma*.

¶ 451(b) (1985). Taylor indisputably failed to preserve his objection under Rule 451(b). (J.A. 51 & 101).

The procedural protections afforded Taylor did not end at the trial, however. First, Taylor could have moved for a new trial based on the incorrect instruction, but he did not. Ill. Rev. Stat. ch. 38, ¶ 116-1 (1985). Second, he still had every right to raise the issue on appeal and, under Illinois' plain-error rule, "substantial defects [in jury instructions] are not waived by failure to make timely objections thereto if the interests of justice require." Ill. Sup. Ct. R. 451(c), Ill. Rev. Stat. ch. 110A, ¶ 451(c) (1985). Taylor indeed challenged the instructions on direct appeal, but the court found the plain-error rule inapplicable—principally because the court found Taylor's voluntary manslaughter case was not strong. Pet. App. 38. The Illinois Supreme Court denied Taylor's petition for further review, and this Court has no reason to question the Illinois Appellate Court's assessment of Taylor's case or application of Illinois' plain-error rule.[10]

This Court has found state criminal procedure adequate to protect a statutory entitlement in *Ross v. Oklahoma*, 487 U.S. 81 (1988). In that capital case, the trial court wrongly deprived the defendant of his statutory entitlement to exercise a limited number of peremptory challenges. This Court affirmed after scrutinizing other aspects of Oklahoma criminal procedure to determine whether that process sufficed, under the Due Process Clause, to protect the defendant's entitlement to his peremptory challenges. Oklahoma law *required* defendants to exercise peremptory challenges to preserve a claim of error re-

[10] *Reddick* requires no different conclusion. Although that case indeed held that use of the pattern murder instructions constituted plain error, the Illinois Supreme Court has held that "*Reddick* should not be applied retroactively" to invalidate final convictions. *People v. Flowers*, 138 Ill. 2d at 239-42, 561 N.E.2d at 682-84.

lating to a wrongful denial of a challenge for cause, and the Court found "nothing arbitrary or irrational about such a requirement, which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury." *Id.* at 90.

Ross parallels this case. As Taylor concedes, Illinois had no more a constitutional obligation to permit a jury to consider voluntary manslaughter than Oklahoma had to create peremptory challenges. Brief for Respondent, p. 41.[11] And just as it was "a long settled principle of Oklahoma law" that a defendant who wanted to preserve a claim of error based on a wrongful denial of a for-cause challenge had to exercise a peremptory challenge, settled Illinois law required defendants to object at trial or meet the plain-error standard to preserve a challenge to an instruction. This rule preserves orderly trial procedure while still permitting reconsideration of the error "if the interests of justice require." Ill. Sup. Ct. R. 451(c), Ill. Rev. Stat. ch. 110A, ¶ 451(c) (1985). *See also Clemons*, 497 U.S. at 746-47 (other state procedures indicated that defendant had no unqualified entitlement to jury sentencing). Illinois criminal procedure amply protected any entitlement Taylor had to jury consideration of his defense.

[11] Indeed, voluntary manslaughter in Illinois is directly analogous to sentencing factors considered by juries in capital cases. After the State presents its murder case, the defendant has the option of bringing forth evidence that will mitigate the sentence down from a maximum of 40 years to a maximum of 15. As the Court reaffirmed in *Cabana v. Bullock*, 474 U.S. 376 (1986), a defendant charged with a serious crime has a constitutional right to have a jury determine his guilt or innocence (by which it meant having the jury consider the elements of the charged crime), but "[t]he decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury." *Id.* at 384-85. *See also Clemons v. Mississippi*, 494 U.S. 738, 745-46 (1990); *McMillan v. Pennsylvania*, 477 U.S. at 93; *Spaziano v. Florida*, 468 U.S. 447, 462-65 (1984).

IV.

THE RULE ANNOUNCED IN THE CASE BELOW DOES NOT QUALIFY FOR RETROACTIVE APPLICATION UNDER THE SECOND *TEAGUE* EXCEPTION.

Teague makes clear that its second exception is reserved for watershed rules of criminal procedure. 489 U.S. at 311. Taylor repeatedly cites to *Washington v. Texas* and *Chambers v. Mississippi* to support his argument that Illinois violated his right to present a defense. Brief for Respondent, pp. 23-25, 31 & 50. Unlike *Gideon v. Wainwright*, 372 U.S. 335 (1963), which indeed announced a "bedrock procedural" rule that defendants have a right to counsel (*Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring in part and dissenting in part)), the new rule upon which Taylor relies would not itself establish any bedrock principle. That honor, as Taylor himself emphasizes, would go to *Washington v. Texas* and *Chambers v. Mississippi*. Accordingly, *Teague*'s second exception does not apply to this case.

CONCLUSION

For these reasons, this Court should reverse.

Respectfully submitted,

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